Golden Wheel Credit Sdn Bhd v Dato' Siah Teong Din

HIGH COURT (KUALA LUMPUR) — SUIT NO WA-22NCC-596–12 OF 2020
ONG CHEE KWAN JC
25 JUNE 2021

Civil Procedure — Striking out — Application for — Licenced moneylending — Claim for balance of loan amount — Cause of action based on money had and received and/or unjust enrichment — Moneylending agreement in breach of Moneylending Act 1951 — Whether moneylender should be allowed to enforce an illegal contract — Whether moneylenders action ought to be struck out

The plaintiff was a licensed moneylender under the Moneylending Act 1951 ('the MLA'). The defendant was a director and a shareholder of one Instant Bonus Development Sdn Bhd. The plaintiff and the defendant entered into two moneylending agreements wherein the plaintiff agreed to provide loans of RM2m and RM1.5m respectively ('moneylending agreements') to Instant Bonus for the purpose of its capital expenditure. The moneylending agreements, however, were executed with the defendant instead of with Instant Bonus. Contemporaneously with the moneylending agreements, the defendant also executed two letters of undertaking relating to the aforesaid loans thereunder ('letters of undertaking'). Both the plaintiff and the defendant had agreed that a sum of RM76,500 would be deducted from the loan sums towards payment of the transaction costs which was to be borne by the defendant. Accordingly, the plaintiff had disbursed a total sum of RM3,423,500 to Instant Bonus. The defendant had paid to the plaintiff a total sum of RM40,000 as repayment for the loan sums, leaving a balance outstanding of RM3,383,500. In this action, the plaintiff sought to recover the sum of RM3,383,500 from the defendant. However, the plaintiff's pleaded cause of action was not based on the moneylending agreements but for money had and received and/ or unjust enrichment. The reason for the plaintiff's reliance on money had and received or unjust enrichment as its cause of action instead of its contractual rights under the moneylending agreements was because the plaintiff had acknowledged that the said moneylending agreements had not complied with many of the mandatory provisions of the MLA which rendered the agreements void and unenforceable. The defendant, on the other hand, applied vide encl 8 to strike out the plaintiff's claim on the ground that the plaintiff was in truth seeking to enforce an illegal contract and that the court should not lend any assistance to give effect to the same.

Held, allowing encl 8 with costs:

(1) The plaintiff sought the repayment of the balance principal sum of RM3,383,500 by, inter alia, relying on s 66 of the Contracts Act 1950. This, however, was disposed off by the court because a claim under s 66 had no application where the moneylending lending agreements were void ab initio and not void subsequent to the contracts which was the case here (see paras 62–63).

(2) The loan sums of RM3,423,500 were not disbursed to the defendant but to Instant Bonus, which was a separate legal entity. Thus, it could not strictly speaking be said that the defendant had personally been enriched by the loan sums for the defendant to restore to the plaintiff. As the defendant had not personally received any benefit from the plaintiff, there was no merit to the plaintiff's contention that it would be unjust for the defendant to keep the 'benefit'. Even if the court accepted the submission that the defendant had benefitted indirectly from the money disbursed to Instant Bonus as the defendant was a director and shareholder of the company, the defendant had a valid defence to the claim for unjust enrichment based on the principle of stultification (see paras 66 & 68–69).

(3) The plaintiff's reliance on s 71 of the Contracts Act 1950 was also similarly misplaced since the defendant did not enjoy any benefit from the transactions that the law would require him to restore. Further, the principle of stultification would apply as well to defeat the plaintiff's claim under s 71. The undisputed facts in the present case fall in the category where the transactions in question, namely, the moneylending agreements fall foul of the MLA and were expressly prohibited by the same. To permit the recovery of the loan sums even if only the outstanding capital would make a mockery of the provisions of the MLA. Therefore, this was a plain and obvious case to strike out the plaintiff's action which was clearly bound to fail (see paras 70 & 75–76).

[Bahasa Malaysia summary

Plaintif adalah pemberi pinjam wang berlesen di bawah Akta Pemberi Pinjam Wang 1951 ('APPW'). Defendan adalah pengarah dan pemegang saham satu Instant Bonus Development Sdn Bhd. Plaintif dan defendan telah memasuki dua perjanjian pinjaman wang di mana plaintif bersetuju untuk memberikan pinjaman sebanyak RM2 juta dan RM1.5 juta ('perjanjian pinjaman wang') kepada Instant Bonus untuk tujuan perbelanjaan modalnya. Perjanjian pinjaman wang tersebut, bagaimanapun, telah ditandatangani dengan defendan dan bukannya dengan Instant Bonus. Serentak dengan perjanjian pinjaman wang tersebut, defendan juga telah menandatangani dua surat aku janji yang berkaitan dengan pinjaman tersebut ('surat aku janji'). Kedua-dua plaintif dan defendan telah bersetuju bahawa sejumlah RM76,500 akan ditolak daripada jumlah pinjaman untuk pembayaran kos transaksi yang perlu ditanggung oleh defendan. Justeru itu, plaintif telah membayarkan sejumlah

RM3,423,500 kepada Instant Bonus. Defendan telah membayar kepada plaintif sejumlah RM40,000 sebagai bayaran balik jumlah pinjaman, meninggalkan baki tertunggak sebanyak RM3,383,500. Dalam tindakan ini, plaintif memohon mendapatkan semula wang sebanyak RM3,383,500 daripada defendan. Walau bagaimanapun, kausa tindakan yang dirayu plaintif tidak berdasarkan perjanjian pinjaman wang tetapi kerana wang yang telah dan diterima dan/atau pengkayaan yang tidak adil. Alasan kebergantungan plaintif terhadap wang telah dan terima atau pengkayaan yang tidak adil sebagai kausa tindakannya dan bukannya hak kontraktualnya di bawah perjanjian pinjaman wang adalah kerana plaintif telah mengakui bahawa perjanjian pinjaman wang tersebut tidak mematuhi banyak peruntukan mandatori APPW yang menjadikan perjanjian terbatal dan tidak boleh dikuatkuasakan. Defendan, sebaliknya, memohon melalui lampiran 8 untuk membatalkan tuntutan plaintif atas alasan bahawa plaintif sebenarnya ingin menguatkuasakan kontrak yang menyalahi undang-undang dan bahawa mahkamah tidak sepatutnya memberi sebarang bantuan untuk melaksanakannya.

Diputuskan, membenarkan lampiran 8 dengan kos:

(1) Plaintif memohon pembayaran balik jumlah baki pokok RM3,383,500 dengan, antara lain, bergantung pada s 66 Akta Kontrak 1950. Walau bagaimanapun, ia telah dilupuskan oleh mahkamah kerana tuntutan di bawah s 66 tidak mempunyai permohonan di mana perjanjian pemberian pinjaman wang adalah terbatal ab initio dan bukan terbatal selepas kontrak seperti yang berlaku di sini (lihat perenggan 62–63).

(2) Jumlah pinjaman sebanyak RM3,423,500 tidak dibayarkan kepada defendan tetapi kepada Instant Bonus, yang merupakan entiti undang-undang yang berasingan. Oleh itu, ia tidak boleh dikatakan secara tegas bahawa defendan secara peribadi telah diperkaya dengan jumlah pinjaman bagi defendan untuk kembalikan kepada plaintif. Oleh kerana defendan tidak menerima apa-apa faedah secara peribadi daripada plaintif, tiada merit kepada dakwaan plaintif bahawa adalah tidak adil bagi defendan untuk menyimpan 'manfaat' tersebut. Walaupun mahkamah menerima hujahan bahawa defendan telah mendapat manfaat secara tidak langsung daripada wang yang dikeluarkan kepada Instant Bonus kerana defendan adalah pengarah dan pemegang saham syarikat, defendan mempunyai pembelaan yang sah terhadap tuntutan pengkayaan yang tidak adil berdasarkan prinsip stultifikasi (lihat perenggan 66 & 68–69).

(3) Kebergantungan plaintif pada s 71 Akta Kontrak 1950 juga sama sekali salah arah kerana defendan tidak menikmati apa-apa faedah daripada urus niaga yang diperlukan dikembalikan oleh undang-undang. Selanjutnya, prinsip stultifikasi akan terpakai juga untuk mengalahkan tuntutan plaintif di bawah s 71. Fakta yang tidak dipertikaikan dalam kes

ini termasuk dalam kategori di mana urus niaga yang dipersoalkan, iaitu, Perjanjian Pinjaman Wang melanggar APPW dan dilarang secara nyata. Untuk membenarkan pengembalian semula jumlah pinjaman walaupun hanya modal tertunggak akan mempersendakan peruntukan APPW. Oleh itu, ini adalah kes yang jelas dan nyata untuk membatalkan tindakan plaintif yang jelas pasti gagal (lihat perenggan 70 & 75–76).]

Cases referred to

Air Express International (M) Sdn Bhd v MISC Agencies Sdn Bhd [2012] 4 MLJ 59, CA (refd)
Bowmakers, Limited v Barnet Instruments, Limited [1945] KB 65, CA (refd)
Dr HK Fong Brainbuilder Pte Ltd v SG-Maths Sdn Bhd & Ors [2021] 1 MLJ 549, CA (refd)
Dream Property Sdn Bhd v Atlas Housing Sdn Bhd [2015] 2 MLJ 441; [2015] 2 CLJ 453, FC (refd)
Holman v Johnson (1775) 1 Cowp 341, KBD (refd)
Liputan Simfoni Sdn Bhd v Pembangunan Orkid Desa Sdn Bhd [2019] 4 MLJ 141, FC (refd)
Mahmood bin Ooyub v Li Chee Loong and another appeal [2020] 6 MLJ 755, CA (refd)
Mustafa bin Osman v Lee Chua & Anor [1996] 2 MLJ 141; [1996] 3 CLJ 494, CA (refd)
Ochroid Trading Ltd and another v Chua Siok Lui (Trading as VIE Import & Export) and another [2018] 1 SLR 363, CA (refd)
Orix Credit Malaysia Sdn Bhd v Choong Keong Kor [2011] MLJU 182, HC (refd)
Pang Mun Chung & Anor v Cheong Huey Charn [2018] 4 MLJ 594, CA (refd)
ParkingEye Ltd v Somerfield Stores Ltd [2013] 2 WLR 939, CA (refd)
Patel v Mirza [2017] 1 All ER 191; [2016] UKSC 42, SC (refd)
Ponnuthurai v Nasib Singh [1964] 1 MLJ 425, FC (refd)
St John Shipping Corporation v Joseph Rank Ltd [1957] 1 QB 267, QBD (refd)
Tinsley v Milligan [1994] 1 AC 340, HL (refd)
Tribe v Tribe [1996] Ch 107, CA (refd)

Legislation referred to

Contracts Act 1950 ss 24, 24(a), (b), (e), 66, 71
Franchise Act 1998 ss 6, 6A
Moneylenders (Control and Licensing) Regulations 2003 Schedules J, K
Moneylending Act 1951 ss 10P, 10P(1), (3), 16, 17(1), (3), 17A, 19
Real Property Gains Tax Act 1976
Stamp Act 1949 s 47

Lai Choong Wui (Nur Fatehah bt Roslan with him) (Alfred Lai & Partners) for the plaintiff.
Lim Kean Lam (KL Lim & Lee) for the defendant.

Ong Chee Kwan JC:

INTRODUCTION

[1] Can a licensed moneylender recover the outstanding principal sum under an illegal moneylending transaction based on a cause of action for money had and received and or unjust enrichment? How does the issue of illegality to be dealt with in such a claim? These are the issues at play in this judgment.

BACKGROUND FACTS

[2] The plaintiff is a licensed moneylender under the Moneylending Act 1951 ('the MLA') and has its registered address at D3A-M (Suite B), Jalan Selaman 1, Dataran Palma, Off Jalan Ampang, 68000 Ampang, Selangor Darul Ehsan and its business address at Suite 8.02, 8th Floor (North Block), The Ampwalk 218, Jalan Ampang, 50460 Kuala Lumpur, Wilayah Persekutuan.

[3] At all material times, the defendant is and was a director and a shareholder of one Instant Bonus Development Sdn Bhd (Company No 988847-P) ('Instant Bonus').

[4] Sometime on 9 July 2018 and 24 August 2018, the plaintiff and the defendant entered into two moneylending agreements wherein the plaintiff agreed to provide loans of RM2m and RM1.5m respectively ('the moneylending agreements') to Instant Bonus for the purpose of its capital expenditure. The moneylending agreements, however, were executed with the defendant instead of with Instant Bonus.

[5] Contemporaneously with the moneylending agreements, the defendant also executed two letters of undertaking on 9 July 2018 and 24 August 2018 respectively relating to the aforesaid loans thereunder ('the letters of undertaking'). The terms of the letters of undertaking include and state as follow:

(a) the defendant directing the plaintiff to disburse the loan sums under the moneylending agreements to Instant Bonus;

(b) the defendant's guarantee and undertaking that the loan sums are deemed as received by the defendant and that the defendant is bound by the loan sums once the same are disbursed to Instant Bonus as instructed by the defendant; and

(c) the defendant further guarantees and undertakes to be liable for all demands, loss and or damages arising from the defendant's instruction.

[6] Both the plaintiff and the defendant had agreed that a sum of RM76,500 would be deducted from the loan sums towards payment of the transaction costs which was to be borne by the defendant.

[7] Accordingly and as agreed aforesaid, it is not in dispute that the plaintiff had disbursed a total sum of RM3,423,500 to Instant Bonus's Maybank account in the following tranches:

(a)	11 July 2018	RM482,000;
(b)	24 July 2018	RM1,470,000; and
(c)	27 August 2018	RM1,471,500.

[8] It is also not in dispute that the defendant had paid to the plaintiff a total sum of RM40,000 as repayment for the loan sums, leaving a balance outstanding of RM3,383,500.

[9] In this action, the plaintiff is seeking for the sum of RM3,383,500 from the defendant. However, the plaintiff's cause of action as pleaded is not based on the moneylending agreements but for money had and received and or unjust enrichment.

[10] It is the plaintiff's pleaded case that the defendant has been unjustly enriched by the loan sums which the defendant had received from the plaintiff. The plaintiff contended that it was never the intention for the defendant to retain the loan sums without the obligation to repay the same and that it is unjust and or unconscionable for the defendant to continue to keep the loan sums without repaying the plaintiff.

[11] The reason for the plaintiff's reliance on money had and received or unjust enrichment as its cause of action instead of its contractual rights under the moneylending agreements is understandable given that the plaintiff had acknowledged in para 11 of the statement of claim that the said moneylending agreements had not complied with many of the mandatory provisions of the MLA including ss 10P and 17(1) thereto which rendered the agreements void and unenforceable. More specifically, ss 10P(1) and (3) and 17(3) of the MLA stipulates:

> 10P(1) A moneylender who intends to lend money to a borrower shall enter into a moneylending agreement with the borrower and that agreement shall be in the prescribed form.
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> ...
>
> (3) Any moneylending agreement which does not comply with the prescribed form shall be void and have no effect and shall not be enforceable.
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> 17(3) Where in a moneylending agreement the interest charged for a secured loan

A or an unsecured loan, as the case may be, is more than that specified in subsection (1), that agreement shall be void and have no effect and shall not be enforceable.

B **[12]** The plaintiff also does not dispute that it had previously brought a legal action against the defendant and Instant Bonus in the Kuala Lumpur High Court Suit No WA-22NCC-211–04 of 2019 ('Suit 211') for the recovery of the loan under the moneylending agreement dated 24 August 2018. Instant Bonus was sued in its capacity as guarantor for the said loan.

C **[13]** However, on 29 May 2019, the plaintiff had discontinued Suit 211 against the defendant which continued only against Instant Bonus.

D **[14]** In the midst of the plaintiff's action against Instant Bonus in Suit 211, the company, Instant Bonus was wound up which had led to the plaintiff filing its proof of debt against the company for the sum of RM3.5m. This proof of debt has been admitted and disclosed in the company's statement of affairs filed with the Director General of Insolvency.

E **[15]** In fact, it is the defendant's contention that the loan sums were intended for Instant Bonus but the plaintiff had insisted for the defendant to execute the moneylending agreements instead and for Instant Bonus to act as guarantor for the loan sums.

F **[16]** The defendant claims that the moneylending agreements contravene the MLA in many respects, in particular:

G (a) notwithstanding that the loans were secured loans, the forms executed by the parties were forms under Schedule J of the Moneylenders (Control and Licensing) Regulations 2003 which are designed for unsecured loans when the proper and required forms ought to be the forms under Schedule K of the Moneylenders (Control and Licensing) Regulations 2003, for secured loans. This is in contravention of s 10P of the MLA;

H (b) the interest charged under the moneylending agreements was 1.5% per month which is equivalent to 18%pa which contravenes s 17A of the MLA that the interest rate chargeable on a secured loan shall not exceed 12%pa;

I (c) the plaintiff also failed to provide the defendant with a stamped copy of the moneylending agreements which is a contravention of s 16 of the MLA; and

(d) the plaintiff had failed to provide the statement of account to the defendant as required under s 19 of the MLA.

[17] As regards the letters of undertaking, the defendant contended that the

same are promissory notes and being unstamped, contravened s 47 of the Stamp Act 1949 which provides:

> 47 Save where other express provision is made by this or any other Act, any unstamped or insufficiently stamped instrument *not being a cheque or promissory note drawn or made within Malaysia* may be stamped after execution on payment of the unpaid duty if the instrument is presented for stamping within thirty days of its execution if executed within Malaysia, or within thirty days after it has been first received in Malaysia if it has been executed out in Malaysia.

[18] The defendant applied under encl 8 to strike out the plaintiff's claim for money had and received and or unjust enrichment on the ground that the plaintiff is in truth seeking to enforce an illegal contract and that this court should not lend any assistance to give effect to the same. Thus, illegality is pleaded as a defence to the cause of action.

LAW ON ILLEGALITY

[19] The facts in this case bring into focus the issues relating to the enforcement of illegal contracts and whether it is permissible to seek restitutionary recovery by way of an independent cause of action in money had and received or unjust enrichment.

[20] Section 24 of the Contracts Act 1950 provides:

> 24 What considerations and objects are lawful, and what not
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> The consideration or object of an agreement is lawful, unless:
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> (a) It is forbidden by a law;
>
> (b) It is of such a nature that, if permitted it would defeat any law;
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> (c) It is fraudulent;
>
> (d) It involves or implies injury to the person or property of another; or
>
> (e) The court regards it as immoral, or opposed to public policy.
>
> In each of the above cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void.

[21] Sections 66 and 71 of the Contracts Act 1950 in turn provide:

> 66 Obligation of person who has received advantage under void agreement, or contract that becomes void
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> When an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under the agreement or contract is bound to restore it, or to make compensation for it, to the person from whom he received it.
>
> 71 Obligation of person enjoying benefit of non-gratuitous act

> Where a person lawfully does anything for another person, or delivers anything to him, not intending to do so gratuitously, and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of, or to restore, the thing so done or delivered.

[22] Prior to the decision by the UK Supreme Court in *Patel v Mirza* [2017] 1 All ER 191; [2016] UKSC 42, the legal position in Malaysia in a case where a party to an illegal and unlawful contract who seeks to enforce his rights thereunder was based primarily on the principle enunciated by Mansfield CJ in *Holman v Johnson* (1775) 1 Cowp 341 that there shall be no recovery based on a contract that is prohibited by illegality. In particular, at p 343, the learned Chief Justice held:

> The objection, that a contract is immoral or illegal as between plaintiff and defendant, sounds at all times very ill in the mouth of the defendant. It is not for his sake, however, that the objection is ever allowed; but it is founded in general principles of policy, which the defendant has the advantage of, contrary to the real justice, as between him and the plaintiff, by accident, if I may so say. The principle of public policy is this: *ex dolo malo non oritur actio.* No Court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act. If, from the plaintiff's own stating or otherwise, the cause of action appears to arise *ex turpi causa,* or the transgression of a positive law of this country, there the Court says he has no right to be assisted. It is upon that ground the court goes; not for the sake of the defendant, but because they will not lend their aid to such a plaintiff. So if the plaintiff and defendant were to change sides, and the defendant was to bring his action against the plaintiff, the latter would then have the advantage of it; for where both are equally in fault, *potior est conditio defendentis.*

[23] Section 24(e) of our Contracts Act 1950 is in fact an adoption and codification of the aforesaid common law principle.

[24] Subsequent cases further distinguished between contracts that are expressly or implicitly prohibited by statutes and those that may contravene certain provisions of the statutes but are not prohibited by the provisions per se. In respect of such cases, the courts recognise that it would be unjust to apply the strict rule on refusing enforcement of the contracts and instead apply the doctrine of proportionality as a response to the illegality in each case (see: the seminal judgment of Devlin J in *St John Shipping Corporation v Joseph Rank Ltd* [1957] 1 QB 267).

[25] Even in cases where the contracts are void under common law, the courts would permit a party who is in *pari delicto* to make a claim as long as there is no need to rely on the illegal contract as the cause of action. This is the reliance principle which were applied by the English Court of Appeal in *Bowmakers, Limited v Barnet Instruments, Limited* [1945] KB 65 and the UK House of Lords decision in *Tinsley v Milligan* [1994] 1 AC 340.

[26] In *Tinsley v Milligan*, Miss Tinsley and Miss Milligan had jointly purchased a house which was registered in Miss Tinsley's name to facilitate a fraud by Miss Milligan to claim her housing benefits. When their relationship soured, Miss Milligan commenced an action to claim her interest in the house. Notwithstanding the illegality, the English House of Lords held that Miss Milligan could assert equitable ownership of the house. More specifically, Lord Browne-Wilkinson held at p 371, para F–H and p 3676, para G as follows:

> ... The presumption of a resulting trust is, in my view, crucial in considering the authorities. On that presumption (and on the contrary presumption of advancement) hinges the answer to the crucial question 'does the plaintiff claiming under the resulting trust have to rely on the underlying illegality?' Where the presumption of resulting trust applies, the plaintiff does not have to rely on the illegality. If he proves that the property is vested in the defendant alone but that the plaintiff provided part of the purchase money, or voluntarily transferred the property to the defendant, the plaintiff establishes his claim under a resulting trust unless either the contrary presumption of advancement displaces the presumption of resulting trust or the defendant leads evidence to rebut the presumption of resulting trust. Therefore, in cases where the presumption of advance does not apply, a plaintiff can establish his equitable interest in the property without relying in any way on the underlying illegal transaction ...
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> ... In my judgment the time has come to decide clearly that the rule is the same whether a plaintiff found himself on a legal or equitable title: he is entitled to recover of he is not forced to plead or rely on the illegality, even if it emerges that the title on which he relied was acquired in the course of carrying through an illegal transaction.
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> As applied in the present case, that principle would operate as follows. *Miss Milligan established a resulting trust by showing that she had contributed to the purchase price of the house and that there was a common understanding between her and Miss Tinsley that they owned the house equally, She had no need to allege or prove why the house was conveyed into the name of Miss Tinsley alone, since that fact was irrelevant to her claim: it was enough to show that the house was in fact vested in Miss Tinsley alone. The illegality only emerged at all because Miss Tinsley sought to raise it. Having proved these facts, Miss Milligan had raised a presumption of resulting trust. There is no evidence to rebut that presumption. Therefore Miss Milligan should succeed.* (Emphasis added.)

[27] Another exception to the strict rule against any recovery in the context of illegality is the principle of 'locus poenitentiae' which means 'the right to withdraw' or 'the time of repentance'. This refers to the act of repentance by a party who had entered into an unlawful contract. If the party in fact withdrew from carrying through with the illegal contract which remains executory, the doctrine will permit the party to recover money paid or goods transferred notwithstanding the illegality.

[28] The policy behind this rule appears to be that it discourages illegality by allowing parties to abandon illegal contracts. Thus, the claimant is allowed to

withdraw from an illegal contract during 'the time for repentance' and recover benefits conferred even though the defendant is ready, willing and able to perform his or her side of the bargain. The precise boundaries of this doctrine are very unclear.

[29] In *Tribe v Tribe* [1996] Ch 107, the English Court of Appeal held that where the presumption of advancement applies in a resulting trust, a plaintiff can rely on the illegality to rebut the presumption if the illegal purposes have not been carried into effect. In that case, Mr Tribe had worked all his life to establish and develop a prosperous business. Upon retirement, he planned to leave the business to his four children in equal parts. Unfortunately, two of his shops ran into some trouble with his landlord and he feared that they would go after his business. Hence, he transferred all his shares in the company to one of his sons on the agreed understanding that when the threat was lifted the son would reassign the shares to his father. Eventually, Mr Tribe came into a satisfactory arrangement with the landlord, thus eliminating his fears. He therefore asked the son to return the shares to him who refused to do so. Since the rebellious assignee was his son, a legal presumption arose according to which property transferred from a father to son is meant as a gift. In order to rebut this presumption, Tribe had to rely directly on the illegal nature of the transaction when giving evidence, and explain that he did not mean to make a gift but rather to cheat his creditors. Evidence of this kind was legally inadmissible, but the court helped the father to get his shares back by declaring that the son held the shares on a resulting trust for his father. The trial judge found that the transfer of the share to his son was made for an illegal purpose, namely to deceive Mr Tribe's creditors, but since the purpose had not been carried out into effect and no creditor is deceived by the transaction, the doctrine of *locus poenitentiae* applied and Mr Tribe was able to recover the shares.

[30] The Court of Appeal unanimously upheld the trial judge's decision. Millet LJ stated ay p 124, para E–F and p 133, para F–G as follow:

> It is, however, also settled both at law and in equity that a person who has transferred property for an illegal purpose can nevertheless recover his property provided that he withdraws from the transaction before the illegal purpose has been wholly or partly performed. This is the doctrine of the *locus poenitentiae* and it applies in equity as well as at law ...
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> ... The primary rule which precludes the court from lending its assistance to a man who founds his cause of action on an illegal or immoral act often leads to a denial of justice . The doctrine of the *locus poenitentiae* is an exception which operates to mitigate the harshness of the primary rule. It enables the court to do justice between the parties even though, in order to do so, it must allow a plaintiff to give evidence of his own dishonest intent. *But he must have withdrawn from the transaction while his dishonesty still lay in intention only. The law draws a line once the intention has been*

wholly or partly carried into effect. (Emphasis added.)

[31] The next development was the decision of the English Court of Appeal in *ParkingEye Ltd v Somerfield Stores Ltd* [2013] 2 WLR 939 where the defence of illegality was rejected when to uphold the same would lead to a disproportionate result. This led the English Court of Appeal into looking at policy considerations underpinning the illegality to assess the proportionate response to the illegality defence.

[32] The aforesaid culminated in *Patel v Mirza* where the majority of the Law Lords of the UK Supreme Court decided in favour of a restitutionary award in response to an unjust enrichment despite the illegal transaction on which the enrichment was based on the premise of a policy based approach as opposed to the traditional rule based approach described above. In particular, the majority Law Lords led by Lord Toulson in the UK Supreme Court held that the rule that a party to an illegal agreement cannot enforce a claim against the other party to the agreement if he has to rely on his own illegal conduct in order to establish the claim is no longer an immutable one. Instead, the court should assess whether the public interest would be harmed by the enforcement of the illegal agreement and this requires the court to consider: (a) the underlying purpose of the prohibition which has been transgressed and whether that purpose will be enhanced by the denial of the claim; (b) any other relevant public policy on which the denial of the claim may have an impact; and (c) whether denial of the claim would be a proportionate response to the illegality, bearing in mind that punishment is a matter for the criminal courts ('the trio of considerations').

[33] The minority comprising Lord Mance, Lord Clarke and Lord Sumption although arrived at the same result as the majority nevertheless adopted a rule-based approach largely in line with the traditional framework that precludes any recovery under an illegal contract but with a more liberal view of the availability of restitutionary recovery.

[34] An excellent analysis of the differences in the reasoning of the nine Justices in *Patel v Mirza* can be found in the Singapore Court of Appeal case of *Ochroid Trading Ltd and another v Chua Siok Lui (Trading as VIE Import & Export) and another* [2018] 1 SLR 363, delivered by Andrew Phang Boon Leong JA. Another useful reference is the article *The Illegality Defence after Patel v Mirza [2016] UKSC 42: A Step Forward?* by Justice Datuk Harmindar Singh Dhaliwal published in The Journal of The Malaysian Judiciary, July 2018 at p 29.

[35] In fact, the Singapore Court of Appeal has declined to follow the policy approach by the majority in *Patel v Mirza* on the grounds that the case:

(a) creates 'an unprincipled distinction between the law applicable in the situation of statutory illegality from that of common law illegality';

(b) 'conflates unnecessarily, the principle of illegality with the alternative restitutionary remedies that might possibly follow thereafter'; and

(c) engenders greater uncertainty as it 'requires the courts to weigh incommensurable factors'.

[36] Unlike Singapore, our courts have adopted, applied or referred to *Patel v Mirza* on at least four occasions.

[37] In the Federal Court case of *Liputan Simfoni Sdn Bhd v Pembangunan Orkid Desa Sdn Bhd* [2019] 4 MLJ 141, the Federal Court had to consider, inter alia, whether a sale and purchase of agreement was void being in contravention of the provisions of Stamp Act 1949 and the Real Property Gains Tax Act 1976. In coming to its conclusion that the contravention of the provisions of the two Acts did not render the agreement illegal, the Federal Court adopted the trio of considerations by Lord Toulson in *Patel v Mirza*. More specifically, at paras [117] and [118] His Lordship Hasan Lah FCJ held:

> [117] Having carefully considered the authorities cited by the parties, we are inclined to agree with the contention of learned counsel for the first defendant that the second SPA is not void. We agree with the view that the courts should be slow in striking down commercial contracts on the ground of illegality. The compliance with the Stamp Act 1949 and the Real Property Gains Tax 1976 are not the prerequisite for the second SPA to be enforceable. There is no prohibition under the two Acts to preclude the first defendant from acquiring rights to the subject land. The Stamp Act 1949 provides a penalty for breach of its provisions. Similarly, under the Real Property Gains Tax Act 1976 there are penalties for breach of its provision. In addition, it is provided that tax due and payable may be recovered by the government by civil proceeding as a debt to the government. The object of the two Acts is to raise revenue. There is therefore no sufficient nexus such as would satisfy the test laid down in *Curragh Investment Ltd*. The first defendant's infringement of the two Acts therefore did not prevent it from suing on the contract which is legal.
>
> [118] In addition, we find that the test laid down by Lord Toulson in *Patel* that is to say, the trio considerations, is a sensible one, which we should follow. Applying the test to the facts of this case, we find that it is an overkill for the first defendant to lose the subject land for the infringement of the two Acts which is punishable by a fine upon conviction.

[38] The Federal Court was dealing with illegality under s 24(b) of the Contracts Act 1950 and had arrived at the conclusion that the sale and purchase agreement though the same had contravened the Stamp Act 1949 and the Real Property Gains Tax 1976, nevertheless, was not void under the said s 24(b) of the Contracts Act 1950. The case therefore involved a contract that was not expressly prohibited.

[39] The next case is *Pang Mun Chung & Anor v Cheong Huey Charn* [2018] 4 MLJ 594 where the Court of Appeal was concerned with the application of the defence of illegality and public policy in relation to an action brought to enforce a trust. A sale and purchase agreement was entered into between the plaintiffs and the first defendant in respect of a property for the purpose of enabling the plaintiff to secure a loan from the bank to raise capital for his laundry business. No consideration was paid by the first defendant under the sale and purchase agreement and the repayment of the loan was undertaken by the plaintiffs for 15 years when the repayment stopped due to the plaintiff's financial constraints. Consequently, the bank auctioned the property which resulted in certain surplus funds held by the bank. The plaintiffs claimed that the surplus was to be held in trust for them. The first defendant in turn alleged at a late stage that the arrangement was a sham and therefore void under s 24(e) of the Contracts Act 1950, contending that the court should not aid the enforcement of an illegal contract.

[40] His Lordship Harmindar Singh Dhaliwal JCA (as he then was) made the following comments on the issue of illegality raised:

> [26] ... In our assessment, if the issue of illegality was taken at a late stage, as it was in this case, then the issue of restitution, whether under s 66 of the Contracts Act, or as unjust enrichment, is an attendant consideration which cannot be divorced from the issue of illegality.
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> ...
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> [28] Dealing now with the issue of illegality, we observe, at the outset, that the law in this regard can be segregated broadly into contracts that are illegal under statute (statutory illegality) or contracts which are illegal at common law. There is no suggestion in the present case of any statutory illegality. We need only concern ourselves with illegality at common law which must be grounded upon established heads of public policy as the case law suggests. This principle is also embodied in s 24(e) of the Contracts Act which provides that any agreement of which the consideration or object is immoral or opposed to public policy is void.

[41] His Lordship then stated clearly at the following passages at paras [72] and [73] of the judgment that the reliance principle as set out in *Tinsley v Milligan* is *no longer* to be follow in Malaysia and that the policy based approach of the majority in *Patel v Mirza* is to be *preferred over* that of the minority:

> [72] We would therefore agree that in deciding whether to grant or refuse relief for contracts affected by illegality, the essential consideration is the public interest in the integrity (and consistency) of the legal system. In assessing whether enforcement of a claim would be harmful to the integrity of the legal system and therefore contrary to the public interest, it is necessary to consider the following: (a) the underlying purpose of the prohibition or reasons why the conduct was made illegal; (b) other relevant public policy which would be affected by a denial of the claim; and

(c) whether denial of the claim would be a proportionate response to the illegality by considering factors such as seriousness of the conduct, its centrality to the contract, whether it was intentional and whether there was a marked disparity in the parties' respective culpability.

[73] We would also agree that the reliance principle set out in *Tinsley v Milligan*, and the cases following it, should be rejected on account of the principle exemplifying the problems of arbitrariness, uncertainty and potential for injustice (see *Patel v Mirza*, Lord Toulson, para 24). In coming to this view, we have not overlooked the views of the minority in *Patel v Mirza* that the discretionary approach advocated by the majority was 'converting legal principle into an exercise of judicial discretion' leading to less clarity and certainty in the law (see Lord Sumption, *Patel v Mirza* at para 265 and Lord Neuberger at para 158). However, we are more persuaded that the approach recommended by the majority is the way forward as it brings an end to the fragmented state of the law. As observed by Lord Kerr in *Patel v Mirza* (at para 123), the courts are now spared from having to 'devise piecemeal and contrived exceptions to previous formulations of the illegality rule'. We also think that it is an approach which is consistent with upholding the integrity and harmony of the law by achieving an equitable result based on the facts in each case.

[42] On the facts of that case and applying the trios of considerations stated in *Patel v Mirza*, the Court of Appeal rejected the illegality defence and stated at para [83]:

[83] In the present case, we take the view that the public policy of denying the first defendant an unjust windfall must take precedence over whatever policy advanced in favour of applying the illegality defence. In this connection, we are reminded of the oft-quoted passage in *St John Shipping Corp v Joseph Rank Ltd* [1957] 1 QB 267 of Devlin J as follows (at p 288): Although the public policy in discouraging unlawful acts and refusing them judicial approval is important, it is not the only relevant policy consideration. There is also the consideration of preventing injustice and the enrichment of one party at the expense of the other.

[43] To be clear, *Pang Mun Chung & Anor v Cheong Huey Charn* was not a case involving statutory illegality but common law illegality.

[44] Lord Toulson himself acknowledged that the policy based approach that he propounded apply only to common law illegality when he said at para [110] of the judgment thus:

[110] The courts must obviously abide by the terms of any statute, but I conclude that it is right for a court which is considering the application of the common law doctrine of illegality to have regard to the policy factors involved and to the nature and circumstances of the illegal conduct in determining whether the public interest in preserving the integrity of the justice system should result in denial of the relief claimed. I put it that way rather than whether the contract should be regarded as tainted by illegality, because the question is whether the relief claimed should be granted.

[45] The reason for the distinction is that the court cannot legislate and is therefore bound by statute. This is why the majority in *Patel v Mirza* acknowledged that the court must obviously abide by the terms of any statute. If a particular provision of a statute prohibits (whether expressly or by implication) a contract, then the court cannot (in the absence of legislative provision) proceed to consider a range of factors in order to decide on a discretionary basis whether it would permit recovery by one of the contracting parties (see: *Ochroid Trading Ltd and another v Chua Siok Lui (Trading as VIE Import & Export) and another*).

[46] Next we have the Court of Appeal case of *Mahmood bin Ooyub v Li Chee Loong and another appeal* [2020] 6 MLJ 755. In this case, the Court of Appeal had heard three appeals together involving moneylending transactions that were disguised as sale and purchase of properties.

[47] Lee Swee Seng JCA held that the device of using a sale and purchase agreement and a memorandum of transfer to secure the grant of a loan with interest to circumvent the provisions of the Moneylenders Act 1951 was clearly void both under that Act as well as s 24 of the Contracts Act 1950.

[48] His Lordship then addressed the question which is most relevant to our present case, namely, whether the court should order restitution of the balance principal sum not repaid in response to the claim that there would be unjust enrichment if the illegality defence is sustained.

[49] In rejecting the claim under unjust enrichment, the learned judge held at paras [259]–[262] as follow:

> [259] In the Singapore Court of Appeal's case of *Ochroid Trading Limited & Anor v Chua Siok Liu (trading as Vie Import & Export) & Anor* [2018] SGCA 5 where a specially convened panel of 5 Judges of Appeal sat to deliberate on this same issue in the light of *Patel v Mirza* [2017] AC 467 watershed decision by the UK Supreme Court on illegality and restitution, the lender there had pleaded in the alternative a repayment of the balance principal sum not paid and the Court of Appeal had dismissed that, affirming the decision of the High Court that the joint venture investment agreement was null and void and unenforceable under the Singapore Moneylenders Act.
>
> [260] At any rate we have given careful consideration to this plea though not pleaded in the Statement of Claim of the lenders and we are of the view that to allow restitution would be to allow the lenders to mock the law prohibiting illegal moneylending under the Moneylenders Act 1951.
>
> [261] It would embolden the illegal moneylenders or 'alongs' as they are pejoratively stigmatised, giving them a gush of wind beneath their wings that they may fly higher with their new fangled and fraudulent schemes structured to look regular and respectable.

A [262] We can almost hear them rejoicing with glee with the refrain, 'catch me if you can' and 'even if you can I'll still get back the balance principal loan!' It would be to give the alongs the best of both worlds and the public policy as reflected in the ever increasing fines and penalties and the greater powers given to the police to investigate and collect evidence would be stymied and stultified in the B Moneylenders (Amendment) Act 2003 and the Moneylenders (Amendment) Act 2011.

[50] When referring to *Patel v Mirza*, Lee Swee Seng JCA held thus:

C [263] The majority in *Patel*'s case had propounded a 'range of factors' test as a defence to a claim in unjust enrichment. The minority seemed to suggest that restitution should always be available and that one should leave it to the criminal law to take care of the criminality aspect of the legislation. Our task is made easier by the clear words of *section 15* of the Moneylenders Act 1951 which reads:

D 15 Contract by unlicensed moneylender

No moneylending agreement in respect of money lent after the coming into force of this Act by an *unlicensed moneylender shall be enforceable.* (Emphasis added.)

E **[51]** The Court of Appeal was clearly dealing with a case of statutory illegality ie the moneylending agreements were entered into by an unlicensed moneylending which had rendered the contract unenforceable. Thus, the application of the trios of consideration in *Patel v Mirza* was not engaged.

F **[52]** Lee Swee Seng JCA then considered whether the claim for restitution can be made under s 66 of the Contracts Act 1950 as an alternative to a claim under the illegal moneylending contracts. On this, the learned judge was emphatic in the rejection of the same:

G [264] Additionally any claim for restitution must also satisfy the requirement of s 66 of the Contracts Act 1950 which provides as follows:

Obligation of person who has received advantage under void agreement, or contract that becomes void 66. When an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under H the agreement or contract is bound to restore it, or to make compensation for it, to the person from whom he received it.

[265] Here is a case where the lenders had carried out their illegal act to the end in the Tan Bock Eng's appeal and Pushpavalli's appeal where the property had been I registered in the name of the lender or his nominee. It is not a case where the unlicensed moneylender was not aware of the illegality for otherwise he would not be engaged in such a convoluted transaction simmering beneath the thin veneer of respectability. It is a case where the agreements were void ab initio and not one where they become void subsequently or are discovered to be void. Section 66 of the Contracts Act 1950 is not available to illegal moneylenders or their nominees in Li

Chee Loong and Lim Len Tat here in these appeals.

[266] It is not for nothing that the whole agreement is made unenforceable. The House of Lords in UK in *Boissevain v Weil* [1950] AC 327 had introduced the stultifying principle where to allow a claim in restitution upon a finding of illegality would be to indirectly allow an enforcement of an illegal loan, albeit severing the illegal interest element from the principal. Lord Radcliffe issued his disapproval at p 341 as follows:

> [I] this claim based on unjust enrichment were a valid one, the court would be enforcing on the respondent just the exchange and just the liability, without her promise, which the Defence Regulation has said that she is not to undertake by her promise. *A court that extended a remedy in such circumstances would merit rather to be blamed for stultifying the law than to be applauded for extending it.* (Emphasis added.)

[267] *Boissevain* case was a claim based on a total failure of consideration for the recovery of a loan which had been made in violation of exchange control regulations under the Defences (Finance) Regulations 1939 (UK). The House or Lords was clear that to allow the claim would be to allow an indirect enforcement of an illegal loan.

[268] Indeed to allow even the lenders to claim the principal would be to stultify the public policy behind the Moneylenders Act 1951. It would be to negate all the efforts put in place by Parliament to try to contain the menace of illegal moneylending with its horror stories of being stripped bare to one's tunic.

[269] It is too late in the day to separate the good from the bad; it is a case where a 'little leaven leavens the whole lump' and that a contaminated fountain cannot pour forth both clear and brackish water. If the source is contaminated the spring and stream would be contaminated as well.

[53] The principle of stultification is aptly explained by Andrew Phang JCA at para [148] in *Ochroid Trading Ltd and another v Chua Siok Lui (Trading as VIE Import & Export) and another* as follows:

> [148] In our judgment, the principle of stultification is both logical as well as common sensical. Whether a claim in unjust enrichment ought to be allowed notwithstanding the illegality of the underlying contract has to be determined by reference to the reason why the contract is prohibited. The concept of stultification is premised on this intuitive insight and furnishes a principled basis upon which to ascertain when, in a situation where there would otherwise be a valid claim in unjust enrichment, the court should nevertheless not allow the claim on the basis of illegality. The court should not allow the claim if to do so would undermine the fundamental policy, be it statutory or of the common law, that rendered the contract in question void and unenforceable in the first place. As Prof Birks perceptively points out, to allow the claim in such a situation would be to make a mockery or nonsense of the law that rendered the contract void and unenforceable to begin with. We would hasten to add that we have added the word 'fundamental' because there could conceivably be situations where to permit recovery pursuant to a claim in unjust enrichment might appear to the court to undermine some other

policy, which policy, however, was not central to the prohibition of the contract concerned. Much will therefore depend on the precise policy considerations as construed in their context.

[54] The most recent case to apply *Patel v Mirza* is another Court of Appeal case, a judgment delivered by Her Ladyship Lau Bee Lan JCA in *Dr HK Fong Brainbuilder Pte Ltd v SG-Maths Sdn Bhd & Ors* [2021] 1 MLJ 549. This is a case dealing with a master licensing agreement which had contravened ss 6 and 6A of the Franchise Act 1998 which provides:

> 6 Registration of franchisor
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> (1) A franchisor shall register his franchise with the Registrar before he can operate a franchise business or make an offer to sell the franchise to any person.
>
> (2) Any franchisor who fails to comply with this section, unless exempted by the Minister under section 58, commits an offence and shall, on conviction, be liable —
>
> (a) If such person is a body corporate, to a fine not exceeding two hundred and fifty thousand ringgit, and for a second or subsequent offence, to a fine not exceeding five hundred thousand ringgit;
>
> 6A Registration of franchisee of foreign franchisor
>
> (1) Before commencing the franchise business, a franchisee who has been granted a franchise from a foreign franchisor shall apply to register the franchise with the Registrar by using the prescribed application form and such application shall be subject to the Registrar's approval.

[55] Her Ladyship Lau Bee Lan JCA had agreed with the holding by the learned High Court judge that the non-registration of the master licensing agreement had the effect of rendering the agreement void and unenforceable under s 24(a) and (b) of the Contracts Act 1950.

[56] Her Ladyship then proceeded to consider the question whether unjust enrichment can be claimed by the party to an illegal contract and in this regard she had initially alluded to the trios of considerations propounded by Lord Toulson in *Patel v Mirza* and the proportionality test submitted by learned counsel for the plaintiff.

[57] In the end, however, Her Ladyship rejected those considerations and based her judgment on the fact that the breaches by the plaintiff of the ss 6 and 6A of the Franchise Act 1998 had rendered the same void and unenforceable. Hence, this was a case that involved a statutory illegality as opposed to common law illegality. Her Ladyship in fact made this clear at para [57]:

> On this score the case of *Pang Mun Chung* can be distinguished as the said case concerns with illegality at common law premised on established heads of public policy and s 24(e) of the CA 1950 whilst the appeal before us concerns with

contracts that are illegal under statute (statutory illegality) as alluded in para 34 above.

[58] Her Ladyship also rejected the plaintiff's claim under s 66 of the Contracts Act 1950 and agreed with the learned High Court judge's finding that:

> As such, the first defendant has not received any advantage under the MLA (2013) to be restored to the plaintiff under s 66 CA. Moreover, the plaintiff has taken the position in this case that MLA (2013) is valid and has not breached FA. Hence, the plaintiff did not plead in the SOC and adduce any evidence regarding any advantage received by the first defendant under a void MLA (2013).
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> (See para [63] of the judgment)

[59] Thus, from the aforesaid four cases, the current law on illegal contracts in Malaysia for the purpose of the present case can be summarised in this manner:

(a) the policy based approach led by Lord Toulson in *Patel v Mirza* has been accepted as the preferred approach when dealing with illegality in common law. This includes both contracts that are prohibited by common law illegality as well as contracts that are not prohibited but the conduct is illegal (contract entered with the object of committing an illegal act);

(b) the reliance principle in *Tinsley v Milliqan* is no longer to be followed;

(c) the policy based approach is not brought into play in cases involving statutory illegality, This is implicit in *Dr HK Fong Brainbuilder Pte Ltd v SG-Maths Sdn Bhd & Ors* and *Mahmood bin Ooyub v Li Chee Loong and another appeal*;

(d) where a contract is *void ab initio*, s 66 of the Contracts Act 1950 has no application to illegal moneylenders; and

(e) the principle of stultification applies in the case where a claim is made for restitution for the recovery of the principal sum lend by the moneylender as to allow even the lenders to claim the principal would be to stultify the public policy behind the Moneylenders Act 1951.

[60] With regards to the claim for unjust enrichment where the moneylending contract is void and unenforceable, one must be clear that the issue of illegality is raised as a defence and not in its contractual sense as explained by Andrew Phang JCA in *Ochroid Trading Ltd and another v Chua Siok Lui (Trading as VIE Import & Export) and another* at para [143] of the judgment:

> [143] The next, and important, issue that impacts the present case directly is

> whether there is any possible defence premised on illegality and public policy that might prevent recovery pursuant to a claim in unjust enrichment. The broader (and more general) issue that goes beyond the present case is this: to what extent is restitutionary recovery pursuant to various independent causes of action (whether in tort, the law of trusts or unjust enrichment) precluded by illegality and public policy? It is of the first importance, at this particular juncture, to emphasise that what we are concerned with here is not the doctrine of illegality and public policy in a contractual sense (ie, the principles of statutory and common law illegality which apply at the first stage of the analysis) but, rather, the concept of illegality and public policy as a defence in the context of a claim in unjust enrichment — both concepts are separate and distinct.

[61] For completeness, even where the contract is unenforceable for illegality, whether by statute or at common law, benefits transferred might be recovered through a restitutionary claim if by permitting the same, it would not lead to stultifying the fundamental policy underlying the prohibition. There is no doubt that title to the property can pass under an illegal contract (see: *Mustafa bin Osman v Lee Chua & Anor* [1996] 2 MLJ 141; [1996] 3 CLJ 494 (CA)). Therefore, in appropriate cases, eg where parties are not in *pari delicto,* the court may still order the recovery of the property so passed.

THE COURT'S EVALUATION OF ENCL 8

[62] In our present case, the plaintiff is seeking the repayment of only the balance principal sum of RM3,383,500 premised on the tort of money had and received and unjust enrichment.

[63] The plaintiff also relied on s 66 of the Contracts Act 1950. This, however, can be easily disposed of based on the judgment by Lee Swee Seng JCA in *Mahmood bin Ooyub v Li Chee Loong and another appeal*. This is because the claim under s 66 has no application where the moneylending lending agreements are void ab initio and not void subsequent to the contracts which is the case here.

[64] In support of its claim based on unjust enrichment under common law, learned counsel for the plaintiff referred this court to the following passage of the Court of Appeal in *Air Express International (M) Sdn Bhd v MISC Agencies Sdn Bhd* [2012] 4 MLJ 59 at p 70, para [24]:

> [24] The appellant stood on solid ground for the claim made as the facts and circumstances of the present case clearly point in its favour for the alternative order prayed for ie for damages or restitution of the amount relating the wrongful usage the appellant's banker's cheque. Restitution means to cause the restoration of a thing, the enrichment or benefit or its money's worth received by the respondent from the wrongful usage of the appellant's banker's cheque, at the expense of the appellant. To determine unjust enrichment, either in relation to s 71 of the

Contracts Act 1950 or the common law, the appellant in this appeal must satisfy the following three enquires: (a) that the respondent was enriched by receiving a benefit; (b) that the benefit received was at the appellant's expense; and (c) that the retention of the benefit by the respondent was unjust (see *Sediperak Sdn Bhd v Baboo Chowdury* [1999] 5 MLJ 229; [1999] 5 CLJ 31).

[65] However, a more comprehensive statement on the law of unjust enrichment is that of our Federal Court. In *Dream Property Sdn Bhd v Atlas Housing Sdn Bhd* [2015] 2 MLJ 441; [2015] 2 CLJ 453 at paras 110 and 117–118 where the Federal Court held the court may grant restitution to a plaintiff when the following four cumulative conditions of a cause of action in unjust enrichment have been proven by the plaintiff:

(a) the defendant had been enriched;

(b) the defendant's enrichment has been gained at the plaintiff's expense;

(c) the defendant's retention of the benefit is unjust; and

(d) the defendant has no defence to extinguish or reduce the defendant's liability to make restitution.

[66] In the present case, the loan sums of RM3,423,500 were not disbursed to the defendant but to Instant Bonus, which is a separate legal entity. Thus, it cannot strictly speaking be said that the defendant had personally been enriched by the loan sums for the defendant to restore to the plaintiff.

[67] In fact as alluded to above, the plaintiff had taken legal proceedings against Instant Bonus and has filed its proof of debt against the company.

[68] As the defendant has not personally received any benefit from the plaintiff, there is no merit to the plaintiff's contention that it would be unjust for the defendant to keep the 'benefit'.

[69] In any case, even if this court accepts the submission that the defendant had benefitted indirectly from the money disbursed to Instant Bonus as the defendant is a director and shareholder of the company, this court holds that the defendant has a valid defence to the claim for unjust enrichment based on the principle of stultification as adopted by Lee Swee Seng JCA in *Mahmood bin Ooyub v Li Chee Loong and another appeal*.

[70] The plaintiff's reliance on s 71 of the Contracts Act 1950 is also similarly misplaced since it is the finding of this court that the defendant did not enjoy any benefit from the transactions that the law would require him to restore. Further, the principle of stultification will apply as well to defeat the plaintiff's claim under s 71.

[71] Finally, the plaintiff had sought to rely on the cause of action for money had and received. In this connection, learned counsel for the plaintiff relied on *Orix Credit Malaysia Sdn Bhd v Choong Keong Kor* [2011] MLJU 182 where the High Court in dealing with a claim for money had and received in a moneylending case held as follows:

> [25] Be that as it may, from my observation of Act 400, there is no provision anywhere in this legislation that an action for recovery of any loans by a licensed moneylender must necessarily be brought under Act 400; or that the plaintiff cannot recover its money lent under any other principle of law. Even if Act 400 is one which allows for contracting out of its operation, which it is not; it is also my judgment that maintaining a claim for money had and received cannot and does not mean that there is an attempt to contract out of its application.
>
> [26] *If there was any non-compliance with any provision of Act 400, and I have not been shown any; it would only mean that the plaintiff is unable to rely on the provisions of Act 400 or enforce the agreement under Act 400. It does not mean that the plaintiff is barred from founding an action based on any other principle of law or right afforded under any other legislation or common law. This was the case in Burton v Companies Registration Agency 23 TLR 337 where the claim was allowed despite the bill of sale being found to be void under s 12 of the Bills of Sale Act 1882. The court held that a void bill merely meant that the claimant was not entitled to recover the money advanced on a higher rate of interest. The claimant was not deprived of the right to recover the money with proper interest.*
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> [30] While the Federal Court in *Ponnuthurai v Nasib Singh* did not address the issue under Act 400, I am nevertheless convinced that the reasoning is the same. Especially since there is nothing prohibitory in Act 400 about maintaining an action outside Act 400; or that an action by licensed moneylenders must only be made within the confines of Act 400. There is clear evidence that the defendant had received a sum of money from the plaintiff to which he had promised to pay or repay in full. He has not repaid in full. In the absence of any valid ground afforded under the law, the defendant is obliged to make good the money that he had received from the plaintiff. There is also no evidence of any intention on the part of the plaintiff that the defendant is allowed to keep the money which he had borrowed from the plaintiff if the plaintiff is unable or decides to not pursue a claim under Act 400. In fact, the defendant is not even making that suggestion. Most importantly, there is 'nothing unlawful about the lending of money in connection with which it was given' here. The loan was for a project which the defendant testified had subsequently failed. Hence, the arguments of the defendant in this regard are without merit and must be dismissed. (Emphasis added.)

[72] The facts of the aforesaid case, upon detailed perusal, disclosed that the learned judge had found no non-compliance of the MLA and based on the aforesaid Her Ladyship opined that the plaintiff was not compelled to base its claim based on the MLA and instead was entitled to pursue its claim premised upon money had and received.

[73] If I am wrong and it is the ratio decidendi of the judgment that a licensed moneylender who had lent out money in contravention of the MLA is nevertheless entitled to recover the principal amount by an independent cause of action for money had and received, I would with deepest of respect decline to adopt the same.

[74] In the Federal Court case of *Ponnuthurai v Nasib Singh* [1964] 1 MLJ 425 which was referred to and relied upon in *Orix Credit Malaysia Sdn Bhd v Choong Keong Kor*, Thomson LP had highlighted the distinction between cases where the contract is forbidden by law and those that are not. It is the latter that the Federal Court was dealing with in that case. This is clear from the following passage of the judgment:

> Counsel for the appellant admitted that the English cases which have been cited were against him. He argued, however, that what was said in them had in some way lost its force as a result of the decision of the House of Lords in the case of *Boissevain v Weil* [1950] 1 All ER 728 where it was held that the courts could not impute a promise to repay money the borrowing of which was forbidden by law. At first sight the argument is not without attractiveness. It contains, however, a fallacy. In the case of *Boissevain v Weil* what was involved was a borrowing during the war of money in francs to be repaid in sterling and in connection with the transaction a sterling cheque was drawn. The transaction itself, however, was forbidden by the current Defence Regulations, *that is, it was something forbidden by law. But what was involved in the present case was a loan of money and lending money is something which is not forbidden by law.* Even if the bill of sale with which we are concerned had been void and so tainted with illegality *ab initio* there was nothing unlawful about the lending of money in connection with which it was given. (Emphasis added.)

[75] The undisputed facts in the present case fall in the category where the transactions in question, namely, the moneylending agreements fall foul of the MLA and are expressly prohibited by the same. To permit the recovery of the loan sums even if only the outstanding capital would make a mockery of the provisions of the MLA.

CONCLUSION

[76] In the premises, I find that this is a plain and obvious case to strike out the plaintiff's action which is clearly bound to fail.

[77] Accordingly, encl 8 is allowed with costs fixed at RM3,000 subject to the usual payment of the allocator.

A *Striking out application allowed.*

Reported by K Selvaraju

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